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Thomas G. Maughan v. Paulette LeDawn Norman Maughan : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THOMAS G. MAUGHAN, Plaintiff and Appellant, vs. PAULETTE LaDAWN NORMAN MAUGHAN, Defendant and Respondent.	*	BRIEF OF RESPONDENT Case No. 870589-CA Priority No. 7

An appeal from a judgment in the First Judicial District Court of Cache County, State of Utah entered by the Honorable VeNoy Christoffersen, District Judge.

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THOMAS G. MAUGHAN,	*	
Plaintiff and Appellant,	*	BRIEF OF RESPONDENT
vs.	*	Case No. 870589-CA
PAULETTE LaDAWN NORMAN MAUGHAN,	*	Priority No. 7
Defendant and Respondent.	*	

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JURISDICTION OF THE COURT

Plaintiff/Appellant, Thomas G. Maughan, has appealed an Order of the First Judicial District Court of Cache County, the Honorable VeNoy Christoffersen, which was entered on or about November 23, 1987. Plaintiff timely filed a Notice of Appeal on or about December 21, 1987, pursuant to Section 78-2-3(2)(g) Utah Code Annotated.

NATURE OF PROCEEDINGS

The parties were divorced by Decree of the First District Court of Cache County, the Honorable VeNoy Christoffersen, on or about February 7, 1983. Defendant was granted custody of an unborn child of the parties, subject to reasonable visitation. That child, Riley Maughan, was born on July 23, 1983.

On or about July 14, 1987, Plaintiff filed a Petition to Modify the Decree requesting custody of Riley. Defendant filed an Answer and Counterpetition on or about August 3, 1987 requesting, among other things, an increase in child support and attorney's fees.

A two day hearing was held October 16, 1987, and again on November 5, 1987, whereafter the Court issued its Memorandum Decision in favor of Defendant on or about November 9, 1987, denying Plaintiff's Petition for Modification on the grounds that there had been no substantial or material change in circumstances of the custodial parent's parenting ability or the functioning of the custodial relationship which would justify reopening the custody questions, increasing child support to $150.00 per month and granting attorney's fees in the amount of $3,000.00. The Findings of Fact and Conclusions of Law and the Judgment and Order were entered on the Petition and Counterpetition on or about November 23, 1987.

STATEMENT OF ISSUES PRESENTED ON APPEAL

It is Defendant's position that there are three central issues to be presented on appeal, which are:

1. Whether the Trial Court abused its discretion in finding that there had not been a substantial nor material change in circumstances relating to Defendant's parenting ability or the functioning of the custodial relationship which would justify reopening the custody question.

2. Whether the Trial Court abused its discretion in awarding attorney's fees to Defendant.

3. Whether the Trial Court abused its discretion in increasing child support.

Since the Trial Court determined that there had not been a material change in circumstances to justify reopening the custody question, the Trial Court did not and could not (nor should this Court) consider the custody issue and if the best interests of the child would be served by a change in custody. Therefore, any determination of the best interests of the child, while the child's best interests may always be a paromount factor, are not an issue to be presented to this Court on appeal.

In addition, Defendant requests this Court to determine if Plaintiff's appeal is meritorious or frivolous, and if attorneys fees and double costs should be awarded to Defendant pursuant to Rule 33(a) of the Rules of the Utah Court of Appeals, for being required to respond to this Appeal.

STATEMENT OF THE CASE

Respondent basically concurs in Appellant's Statement of the Case.

STATEMENT OF FACTS

Respondent concurs with Appellant's Statement of Facts, except as follows, and with additional facts as stated herein:

1. Defendant's moves were occassioned by her attempts to

receive vocational training in order to obtain employment and/or to improve employment. The majority of the moves were temporary in nature while relocating because of vocational training or employment. (TR pp. 9-13).

2. Defendant has always resided in either Cache County, Box Elder County, Davis County, or Salt Lake County, all relatively close to Plaintiff's residence. (TR pp. 9-13)

3. Defendant acknowledged going to bars on various weekends with a friend, but at no time acknowledged "bar hopping" as referred to by Plaintiff's counsel. "Bar hopping" is an acronym composed by Plaintiff's counsel and in no way correctly depicts Defendant's social activities or the propriety of her activities with her friends. (TR pp. 30-31)

4. Defendant acknowledged relationships with various men, but indicated that only one of the men stayed with her in the Kearns apartment rented from Bill Peck. On the substantial majority of occasions Defendant would have a boyfriend stay with her, the children were not at home and were visiting with their fathers on weekend visitation. (TR pp. 58, 368)

5. At no time did Defendant expose herself improperly to her children or engage in sexual acts or conduct in front of the children. (TR p. 368)

6. Although there was substantial evidence presented regarding alleged abuse of Riley by Defendant's boyfriend, Jack Alley, the Trial Court made no finding as to the truth of those allegations, but did specifically find that Defendant was not aware of any alleged abuse and that Defendant immediately took

what steps she could to ensure the child's safety and welfare and immediately consulted professionals for aid when the allegations became known to her. (MD pp. 3, 5 TAB 1)

7. Judge Christoffersen found that there was conflicting testimony regarding Defendant's housekeeping abilities and parenting skills, but specifically found that Defendant properly maintained the home and took care of the child and that Defendant's care for Riley and her parenting skills were not inappropriate, further finding that Riley was clean and well cared for and that Defendant showed great affection for Riley. (MD p. 4 TAB 1; FF #1 TAB 2)

8. The District Court did not accept testimony regarding allegations of excrement being smeared on the walls, the alleged cleanliness of Defendant's apartment, or condition of her laundry, and any statements by Plaintiff in Plaintiff's Brief to the effect are allegations not accepted by the Court as fact. There is no mention of those allegations in the Court's Memorandum Decision nor in the Findings of Fact, and, therefore, those allegations cannot be stated as fact.

9. Defendant explained that the medical treatment she had received for a suspected miscarriage is technically termed a "clinical abortion" for medical purposes and denied ever aborting an unborn fetus. The "clinical abortion" related only to the common medical treatment as a result of her miscarriage. (TR p. 51)

SUMMARY OF ARGUMENTS

I. The Trial Court is afforded considerable discretion which can only be overcome by a showing that the evidence clearly preponderates to the contrary or that the Trial Court clearly abused its discretion or misapplied the law, which does not exist in the instant action.

A. The Trial Court is in the best position to weigh the evidence and consider the credibility and reliability of the witnesses. The Trial Court weighed and considered the evidence, including Defendant's residential moves and job changes, alleged lack of supervision and care of her children, alleged sexual conduct and other matters, and determined that there had not been a substantial change in Defendant's parenting ability or the custodial relationship in order to warrant reopening the custody question.

B. The Supreme Court of Utah has set forth clear and specific guidelines for the trial courts to follow in modification actions.

C. Conflicting testimony by neighbors and acquaintences as well as expert witnesses was adequately considered by the Court.

D. The best interests of the children in any divorce or post-divorce custody action is always of paramount importance. However, in a modification action, the moving party must first overcome the threshold showing of a substantial change in circumstances related to the custodial parent's

parenting ability and the functioning of the custodial relationship. As determined by the Trial Court in the instant action, Plaintiff did not meet that substantial burden.

E. Even had the Trial Court considered "best interests" factor, the testimony of the family therapist, Dr. B. Mathews Hill, Ed. D., inidicated that Respondent was a good parent and at no time stated that the best interests of the minor child would be served by changing custody.

II. The Trial Court has considerable discretion in awarding attorney's fees and considered the reasonableness of the hourly rate as to the community standard, the necessity of the number of hours, Defendant's need, the financial condition of the parties and all other factors in determining attorney's fees.

A. Evidence and testimony proffered by Defendant's counsel and the Findings of Fact entered by the Court clearly meet the requirements necessary for the Court to award attorney's fees.

III. The Trial Court is granted considerable discretion in establishing child support.

A. Appellant's new job with the State Highway Department in addition to his farming income was considered by the Court as a substantial and material change of circumstances.

B. The Uniform Child Support Guidelines are to be followed in temporary child support orders and even then can be modified by the Court. However, the Court's award of child support still falls within the Uniform Child Support Guidelines.

IV. In light of the clear outcome of the case, there is no reasonable basis for Plaintiff's appeal and Defendant should be awarded attorneys fees and double costs.

ARGUMENTS

I.

THE TRIAL COURT IS AFFORDED CONSIDERABLE DISCRETION, WHICH CAN ONLY BE OVERCOME BY A SHOWING THAT THE EVIDENCE CLEARLY PREPONDERATES TO THE CONTRARY OR THAT THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION OR MISAPPLIED THE LAW, WHICH DOES NOT EXIST IN THE INSTANT ACTION.

A. The Trial Court is clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions.

It is a long-established principle of appellate review that the trial court is granted considerable defference in its decisions which can only be overcome by a clear showing that the trial court abused its discretion in entering its decision. The reason is obvious. It is the trial court which is in the position to hear the testimony and consider the credibility of the witnesses, not only from their statements, but from their appearance, candor and demeanor. The trial court

is in the best position to determine and weigh factors which cannot be incorporated into the transcript which is read by the appellate court. This is especially true in divorce actions which are equitable in nature and in which the court is given wide discretion in entering its decisions.

This principle was most recently reiterated by this Court in PORCO v. PORCO, 79 Utah Adv. Rep. 35 (Utah Ct. App. 1988) wherein Judge Garff stated:

> To overturn [a finding of the trial court], Plaintiff must show that the evidence clearly preponderates to the contrary, or that the trial court abused its discretion or misapplied the law, or that the trial court's award works such a manifest in Justice as to show clearly an abuse in discretion. GILL v. GILL, 718 P.2d 779, 780 (Utah 1986). However, the trial court is afforded considerable discretion, and its actions are cloaked with a presumption of validity. Id.; see also KING v. KING, 717 P.2d 715, 715-16 (Utah 1986); BOYLE v. BOYLE, 735 P.2d 669, 670 (Utah Ct. App. 1987). 79 Utah Adv. Rep. at 35.

In a case similar to the instant action, the Utah Supreme Court has clearly stated the purpose and paramaters of appellate review and the factors to be considered by the appellate. In SHIOJI v. SHIOJI, 712 P.2d 197 (Utah, 1985), the Utah Supreme Court stated:

> In divorce proceedings, including custody matters, the trial court is afforded particularly broad discretion. Only where the trial court's judgment is so flagrantly unjust as to be an abuse of discretion will this Court interpose its own judgment. The issue on appeal is not whether the trial court's findings accord with our own view of the evidence, but whether, viewing the evidence and the reasonable inferences therefrom in the

> light most favorable to the findings, the findings are supported by the evidence. The trial court's proximity to the witnesses and its opportunity to hear their testimony and observe their demeanor, places it in a far more advantaged position than this Court, which must rely on an inanimate record. 712 P.2d at 210.

The Utah Supreme Court further stated in **FONTENOT v. FONTENOT**, 714 P.2d 1131 (Utah, 1986):

> We do not disturb the trial court's decision absent a showing of an abuse of discretion or manifest injustice. In these matters we will not interpose our own judgment in place of the trial court's broad exercise of discretion unless it is shown to be so flagrantly unjust as to be an abuse of discretion. The issue on appeal is not whether the trial court's exercise of its discretion accords with our own view of the evidence, but whether its findings are supported by substantial evidence. 714 P.2d at 1132, 1133.

The trial court's discretionary authority should be even more strictly preserved in dealing with requests for modification of earlier custody awards, as in this action. In that regard, Justice Zimmerman stated in his concurring opinion in **SMITH v. SMITH**, 726 P.2d 423 (Utah 1986):

> I find nothing objectionable in the majority's statement that we give wide deference to trial court decisions in the custody area, at least when we are reviewing rulings, such as the instant one, that involve initial placements. And I stronly support that portion of the opinion that requires written findings of fact and conclusions of law explaining how the factors relavent to a determination of the best interests of the child bear upon the ultimate resolution reached by the trial court. However, I disagree with any implication in the majority opinion that decisions regarding the modification of earlier custody awards also are entitled to such broad defference. In my view, that is

> not the law, and it is not sound policy. See SHIOJI v. SHIOJI, 712 P.2d 197, 202 (Utah, 1985) (Zimmerman, J. dissenting): See also MOODY v. MOODY, 715 P.2d 507, 510 (Utah 1985) (Zimmerman, J., concuring in result) (very high standard for reopening custodial orders); HIRSCH v. HIRSCH, 725 P.2d 1320, 1322 (Utah 1986) (Zimmerman, J., concuring separately) (custody changes governed by strict standards, different from those applicable in initial custody awards). To state the applicable standard carelessly is to invite confusion in an area in which courts have exceptional powers over the lives of children of divorced parents, an area where the erradication of such confusion should be an important goal. HIRSCH v. HIRSCH, 725 P.2d at 1322 (Zimmerman, J., concuring separately). 726 P.2d at 426, 427.

B. The Supreme Court of Utah has set forth clear and specific guidelines for the trial courts to follow in modification actions.

The development in Utah law regarding the requirements which must be met to modify a custody decree is detailed in the Utah Supreme Court decison of KRAMER v. KRAMER, 738 P.2d 624 (Utah 1987). Therein, Justice Zimmerman, in writing the majority opinion, outlines the development of the law from HOGGE v. HOGGE, 649 P.2d 51 (Utah 1982), in which Plaintiff's counsel in the instant action, Mr. Healy, was counsel for Defendant/Respondent in the HOGGE case, to the most recent decisions regarding custody modification action.

In KRAMER, the trial court ruled that there had not been a sufficient change in circumstances to reconsider the earlier custody award. The father, the non-custodial parent, claimed that he had remarried, that he, his new wife, and her two children by a previous marriage had formed

a good relationship with the child and that he had obtained advanced degrees in phsychology and had good employment. The father claimed that his ex-wife's new husband beat her, that she was an alcoholic, that she suffered from a narcistic personality, that she created animosity between the child and his father, that she refused to obtain treatment for the child's alleged speech defects and that the child was unwashed and unkempt when the father came to the home for visitation. The opinion stated that the mother's evidence contradicted the father's in nearly every respect.

In reviewing the standards which must be followed in custody modification cases, Justice Zimmerman stated:

> A central premise of our recent child custody cases is the view that stable custody arrangements are of critical importance to the child's proper development. See e.g., FONTENOT v. FONTENOT, 714 P.2d 1131, 1132 (Utah 1986); SHIOJI v. SHIOJI, 712 P.2d 197, 203 (Utah 1985)(Zimmerman, J., dissenting); BECKER v. BECKER, 694 P.2d 608, 610 (Utah 1984); HOGGE v. HOGGE, 649 P.2d 51, 55 (Utah 1982); B. HAFEN, THE CONSTITUTIONAL STATUS OF MARRIAGE, KINSHIP, AND SEXUAL PRIVACY - BALANCING THE INDIVIDUAL AND SOCIAL INTERESTS, 81 Mich. L. Rev. 463, 473-74 (1983.) The two-part HOGGE test is founded upon that premise. HOGGE v. HOGGE, 649 P.2d at 54. No matter how well intentioned, changes in custody can do more harm than good. See HAFEN, Supra, at 474. For this reason, when a trial court has been asked to determine whether there has been a change of circumstances sufficient to warrant reopening the custody decree, ordinarily it must focus exclusively on the parenting ability of the custodial parent and the functioning of the established custodial relationship. 738 P.2d at 626.

Justice Zimmerman further indicated:

> The "change of circustances" threshold is high to discourage frequent petitions for modification of custody decrees. The test was designed to "protect the custodial parent from harrassment by repeated litigation" and to protect the child from "ping-pong custody wars". See HOGGE, 649 P.2d at 53-54. 738 P.2d at 626.

The trial court in the instant action carefully followed the KRAMER decision in not only reaching its own decision, but in allowing certain testimony. During the trial, the Court quoted from KRAMER when Plaintiff was attempting to introduce evidence regarding his change in circumstances and parenting abilities. The Trial Court stated:

> I'll just quote from one of them and that is KRAMER versus KRAMER, where on appeal on the same circumstances the father was seeking [a] custodial change claiming the trial court erred in refusing to consider change in the noncustodial parent's situations when determining there had been a sufficient change of circumstances. The court goes on to say we disagree. You only focus on the change of circumstances of the custodial parent. (TR p. 204)

C. Conflicting testimony by neighbors and acquaintances as well as expert witnesses was adequately considered by the Court.

The modification hearing in the case at bar lasted two days. A total of eighteen witnesses were called and gave testimony. In the Trial Court's Memorandum Decision (TAB 1) Judge Christoffersen reviewed the testimony of each of the witnesses, those called by the Plaintiff and by the Defendant, as well as the parties themselves, and stated

that the testimony offered by Plaintiff's witnesses had been contradicted by the Defedant as well as witnesses called in her behalf. (MD p. 2, TAB 1) The Trial Court stated in that regard:

> The Court feels that the evidence does not support the Defendant being a bad mother by improper child care, cleanliness, supervision, or lack thereof, that she is a good mother with appropriate child caring skills now as when she was married. (MD p. 4 TAB 1)

As an indication of the contrasting evidence and testimony upon which the Trial Court based its decision, which Plaintiff claims is an abuse of discretion, Defendant would like to herein briefly respond to the claims raised in Appellant's Brief, and relate contrasting testimony:

ALLEGATIONS OF FREQUENT MOVES. Plaintiff claims that Defendant's various residential moves were detrimental to the child and points out to this Court that Defendant moved twelve times in four years. What Plaintiff does not point out is that most of the moves were to allow Defendant as a young, single, mother to improve her job training and job skills and to obtain adequate employment.

Shortly after the divorce, Plaintiff resided with her mother for one month in Wellsville where the parties had lived while married, until Defendant could arrange for an apartment in Logan. After approximately one year, Defendant moved to Clearfield to obtain employment. She stayed there for approximately eight months and then moved to Brigham

City to obtain additional vocational education and to complete a secretarial course. She first stayed with an aunt in Brigham City for approximately one month until she could find an apartment on her own. After she completed her secretarial course, Defendant moved to Salt Lake to obtain employment. Defendant lived in two different apartments in Salt Lake with the second move in Salt Lake being an attempt to find less costly housing. From Salt Lake, Defendant returned to Logan where her mother and other extended family live and to obtain employment. Defendant lived in three different apartments in Logan, each an attempt to improve her situation. (TR pp. 11-13) Clearly those were all factors considered by the Court in reaching its decision.

STABILITY. Plaintiff further claims that the family therapist, Dr. Hill, indicated the moves were detrimental to Riley. However, in referring to stability of environment, Dr. Hill refers to the extensive visitation exercised by Plaintiff and the need for visitation to stabilize. (Dr. Hill p. 6 TAB 4) Defendant had stated that she had always attempted to encourage as much visitation and contact between Riley and his father and stepmother as possible, even to the extent of having Riley stay with his father for two and three weeks in his home and then back in her home for two or three weeks. Defendant was of the impression that extended visitation was beneficial and always worked to encourage a strong relationship. (TR pp. 55 and 56.)

Defendant then learned and was advised that the extensive visitation schedule was more unstabling than beneficial and was futher advised that visitation should be every other weekend (TR pg. 56,) which is supported by Dr. Hill.

SUPERVISION OF CHILDREN. As reviewed by the Court in its Memorandum Decision, Plaintiff called several witnesses to testify of Defendant's lack of supervision of the children, including allowing the children to break open a screen and crawl out through a basement window and other isolated incidents. The Court noted that Defendant's witnesses had indicated proper supervision and control of the children. (MD pp. 1-4, TAB 1) The Court may have also considered that young boys ages 5 and 7 sometimes get into trouble in spite of the most stringent supervision.

ALLEGED SEXUAL CONDUCT. Plaintiff alleges that Defendant's sexual activity was improper and adversly impacted the child. The Supreme Court of Utah has indicated that "the custodial parent's extramarital sexual relationship alone is insufficient to justify change of custody." FONTENOT v. FONTENOT, 714 P.2d 1131 (Utah 1986).

In FONTENOT, after separation from her husband, the plaintiff engaged in separate overnight relationships with various men in her home. At the time of the initial trial, she had recently given birth to a third child resulting from one of the affairs. The court indicated that although the

children were personally acquainted with these male companions, the plaintiff had testified that she was discrete in her intimate relationships. The court further noted that there was no evidence that the children had been directly exposed to or affected by the mother's sexual behavior and the trial court had made no finding that the children were adversely impacted by these relationships, and that the defendant had not presented any evidence which would support such a finding.

In the instant action, the Plaintiff testified that she seldom had boyfriends stay with her overnight while the children were there, since each of her children were visiting with their father on alternate weekend visitation. (TR p. 368) Defendant further testified that although Riley had seen her and her boyfriend, Jack Alley, in bed at approximately 2:00 a.m. on one occassion, at no time did she or her boyfriend ever expose themselves to the children or at any other time. (TR pp. 52-53) The Court specifically found that Plaintiff's sexual relations had not impacted or affected the child. (F.F. p.2 TAB 2; MD p.6 TAB 1)

Judge Christoffersen considered all of this in information and more in entering his decision and clearly considered all of the testimony before him. As indicated, there is more than sufficient evidence to support the decision.

D. Considerations of the best interests of the child in custody modification requests.

The Trial Court referred to both the HOGGE and KRAMER decisions in his Memorandum Decision, (MD p. 5 TAB 1) and based his decision in the instant action on a clear understanding of the standards set forth in KRAMER and its progeny. The Trial Court, after having had the opportunity to listen to the Defendant and to determine what kind of person she is, recognized that although there were facts and circumstances about the Defendant's living condition and lifestyle that may not be the best for the child, it could not be said that her actions and conduct in the situation constituted a substantial change in circumstances. The Trial Court stated:

> The conduct, whatever it may be of the Defendant, must be shown to have a substantial adverse impact upon the child, showing a material change of circumstances. That impact has not been shown even if her conduct has had defects and she bore an illigitimate child. Petitioner's request to have the custody changed is denied.(MD p. 6 TAB 1)

The Trial Court further indicated that the changes that normally occur in a divorce are not grounds to show a substantial change in circustances that would merit or should even be considered in determining the requisite substantial change in circumstances for a change in custody. The Court also stated that divorce causes a change in circumstances by the very nature of the result of such a proceeding. (MD pp. 3 and 4 TAB 1). In that regard, Judge Christoffersen stated:

> A single parent who has to take what employment they can get certainly has more difficulty as opposed to dual parents. The single parent has to

> arrange schedules, child care, perform all the household tasks, that are necessary. The Court does not feel that the Defendant should be penalized because of this kind of situation where she does not have the same financial abilities as the Petitioner in order to provide a stable environment. The fact that the Petitioner has remarried making this a dual parent household is not such a substantial change of circumstances that would merit a change of custody or simply any remarriage would have the ping-pong effect on child custody.
>
> The Court, therefore, feels the Petitioner has not met the first prong of the test as stated under HOGG v. HOGG [sic], 649 P.2d 51. The Court feels the facts do not show Defendant's present position substantially affects the custodial parenting ability or the functioning of the custodial relationship, which would justify reopening the custody question. (MD p. 5 TAB 1)

E. The family therapist also concluded that Defendant is a good parent

Furthermore, although Plaintiff claims that the family therapist, Dr. Hill, suggested that custody would be best placed with Plaintiff, even Plaintiff notes that Dr. Hill only indicated that Plaintiff's home represented the "more stable environment." At no time did Dr. Hill indicate a preference as to custody or who should have custody. In fact, in the conclusion of his report, Dr. Hill focuses on the stability of the environment and states: "Looking after the best interests of the child does not always involve deciding between good and bad, but may also look at good versus better." (Hill p. 8 TAB 4) Dr. Hill further testified at the hearing that Defendant was a good parent. (TR pp. 137, 142)

The fact remains, based on all the evidence of the parties, the Court concluded that Defendant was " a good mother with appropriate child caring skills now as when she was married." (MD p. 4 TAB 1)

Certainly, there is more than sufficient evidence to support the Trial Court's decision that there had not been a substantial change in circumstances to warrant reopening the custody matter. The Court's decision should, therefore, be affirmed.

II.

THE TRIAL COURT HAS CONSIDERABLE DISCRETION IN AWARDING ATTORNEY'S FEES. IN THE INSTANT ACTION, THE COURT CONSIDERED THE REASONABLENESS OF THE HOURLY RATE AS COMPARED TO THE COMMUNITY STANDARD, THE NECESSITY OF THE NUMBER OF HOURS, DEFENDANT'S NEED AND THE FINANCIAL CONDITION OF THE PARTIES.

A. Evidence and testimony proffered by Defendant's counsel and the Findings of Fact entered by the Court clearly meet the requirements necessary for the Court to award attorney's fees.

Defendant's counsel is aware of the necessity and requirement of presenting evidence and testimony to the court in order for the court to grant an award of attorney's fees. In fact, Defendant's counsel referred to the TALLEY case when informing the court of his intended proffer. (TR p. 392)

Counsel then proffered that he has spent forty-seven hours on the case and that he billed attorney's fees at Seventy-Five Dollars ($75.00) an hour, totalling Three Thousand Five Hundred Forty Dollars ($3,540.00). Although counsel did not specifically proffer the necessity or reasonableness in light of circumstances achieved, the Trial Court asked Plaintiff's counsel if the proffer were acceptable to him. The Court further asked Plaintiff's counsel if he wanted Defendant's counsel to ". . . testify as to the necessity of the number of hours or whether that's a reasonable rate that's charged in this area . . ." (TR p. 393).

Plaintiff's counsel then stipulated that $75.00 an hour was a reasonable rate and indicated that he would accept the proffer, but did not agree with the total number of hours. (TR 393).

In his memorandum decision, Judge Christoffersen granted Defendant attorney's fees in the amount of $3,000.00 stating:

> The Court finds that in view of the difference in earning ability and actual income received by both parties, the Defendant has sufficiently demonstrated the financial need for attorney's fees. The Defendant proffered evidence of attorney's fees, showing the time spent and hourly rate charged and his position of the necessity of the number of hours spent and it was stipulated by counsel for the opposing side that the rate charged was a reasonable one and was commonly charged for divorce action in this community. Therefore, the Court awards Defendant attorney's fees based on the need and results achieved in the case in the amount of $3,000.00. (MD p. 6 TAB 1)

The Court further entered specific Findings of Fact and Conclusions of Law regarding attorney's fees, the time spent, the hourly rate charged and the number and necessity of hours spent in light of the difficulty of the case and the results achieved. (FF # 7 & 8, Conclusion #4) No objections to the Findings of Fact or Conclusions of Law were ever raised by Plaintiff.

This Court has recently stated in ASPER v. ASPER, 81 Utah Adv. Rep. 43 (Utah Ct. App. 1988), that in order to award attorney's fees in a divorce action, the award must be based on the need of the party and the reasonableness of the fees awarded, a matter largley left to the discretion of the trial court. 81 Utah Adv. Rep. at 45. (See also WALTHER v WALTHER, 709 P.2d 387, 388, (Utah 1985). In ASPER, this Court remanded the case to the trial court for a determination of the need of Mrs. Asper for attorney's fees. In the instant action, that need has already been clearly established and the reasonableness and necessity of the attorney's fees can also reasonably be determined from the record and the proffer made.

This Court should also take note of the concurring opinion of Justice Durham in NEWMEYER v NEWMEYER, 69 Utah Adv. Rep. 32 (Utah Ct. App. 1987), wherein Justice Durham stated:

> I concur in the majority opinion except for its vacation of the award of attorney's fees. The standard of reasonableness set forth by the

> majority is entirely correct, but in view of the pleadings, discovery, pretrial appearances, full day's trial, and number and complexity of the issues, all of which are patent on the face of the record (and therefore obvious also to the trial judge), I think that the trial court had sufficient information to assess reasonableness. . . . Keeping in mind that the trial itself took a full day and that there was a pretrial hearing on support and at least one deposition taken by Defendant's counsel, I have no difficulty taking judicial notice that the fee of $1,423.00 was reasonable. In view of Plaintiff's need, I think it inappropriate to deny her the assistance ordered by the trial court.

The necessity of the attorneys fees in the instant action is reflected in the court records. There were pleadings and affidavits prepared to request Judge Call to vacate his Ex-Parte Custody Order; an initial hearing on the order to show cause and two days of trial; interrogatories prepared and responded to and considerable trial preparation in interviewing the numerous witnesses. There is more than sufficient evidence in the record and from the proffer for the trial court to determine necessity. In fact, the Court ultimately established attorney's fees in an amount less than proffered by counsel, indicating that Judge Christoffersen reviewed the matter and considered the relevant factors in making a decision regarding attorney's fees.

The Court did not abuse its descretion nor did the Court err in awarding attorney's fees, especially in light of the Defendant's need and circumstances and the eventual outcome of the action.

III.

THE TRIAL COURT IS GRANTED CONSIDERABLE DISCRETION WHEN ESTABLISHING CHILD SUPPORT.

A. Appellant's new job with the State Highway Department in addition to his farming income was considered by the Court as a substantial and material change of circumstances.

Child support was originally established pursuant to a stipulated divorce decree, which was entered prior to the birth of the child. At the time of the trial, the child was four years old and Defendant's income had substantially increased in that Defendant was still maintaining the farming operations he was involved in at the time of the marriage and was also employed with the Utah Department of Transportation in addition to the farming operation. The Trial Court found as follows:

> The Defendant also has a Counterpetition for a change in child support payments because of a substantial change of circumstances showing that at the time of the divorce the income on farm income was based upon $800.00 to $1,000.00 per month income. The Petitioner now has other employment where he receives a gross income of $1,240.00 in addition to the farm income, which at the time of the divorce was indictaed to be $800.00 to $1,000.00. Although the Petitioner testifies that farm income has now been reduced to anywhere from $700.00 a month to $0 or in fact a natural loss. But, even so, his gross income has

> substantially increased more than double that of the Defendant. Even eliminating the farm income, there is a substantial increase since the time of the divorce. The Court will, therefore, grant the petition for change of child support and raise the figure to $150.00 per month. (MD p. 7 TAB 1; FF # 9, 10, & 11 TAB 2)

B. The Uniform Child Support Guidelines are to be followed in temporary child support orders and even then can be modified by the Court However, the Court's award of child support still falls within the Uniform Child Support Guidelines.

As indicated by Plaintiff, the Department of Social Services, under mandate from the Utah Legislature, has prepared a Uniform Child Support Schedule. However, as stated in UCA 78-45-7(4) the Child Support Schedule is for temporary support only and has no bearing on permanent support orders issued by the court. Furthermore, the court is allowed discretion in applying the child support schedule based upon the specific circustances of each case.

Even applying the child support schedule which was in effect at the time of the Court's decision, which is attached hereto as TAB 3, (which was effective as of September 1, 1987), based solely on Plaintiff's income from the Department of Transportation of $1,240.00 per month, his child support obligation would be $152.00 per month. This does not consider any income Plaintiff may derive from farming operations.

The trial court is granted considerable discretion and latitude in entering support orders. The Court was certainly aware of Plaintiff's child by his current marriage and may have considered in the decision. Even without considering a second child, there is certainly substantial evidence to justify the Court's decision to increase child support. And even then, $150.00 per month is a very moderate amount in assisting in the monetary needs of supporting and raising a child, especially considering Defendant's income ability and circumstances.

IV.

IN LIGHT OF THE CLEAR OUTCOME OF THE ACTION, THERE IS NO REASONABLE BASIS FOR PLAINTIFF'S APPEAL AND DEFENDANT SHOULD BE AWARDED ATTORNEYS FEES AND DOUBLE COSTS.

Pursuant to Rule 33(a) of the Rules of the Utah Court of Appeals, "If the court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorneys fees to the prevailing party." Although this Court has indicated that " . . . sanctions for frivolous appeals should only be applied in egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions." (PORCO v. PORCO, Supra at 36) Plaintiff's appeal should be considered egregious since the Trial Court clearly enumerated its findings and the basis of its decision, making it extremely

unlikely that Plaintiff could reasonably be expected to prevail on the appeal given the standards of appellate review of the court's decision, and further considering Defendant's extremly limited income and ability to afford to respond to the appeal.

In **PORCO**, the court defined a frivolous appeal as "one having no reasonable legal or factual basis as defined in Rule 40(A)." 79 Utah Adv. Rep. at 36. In that case, the court granted sanctions because of plaintiff's continual harrasment of the defendant through legal actions and the clear likelihood that he would not prevail on the appeal. This Court further stated:

> We recognize that sanctions for frivolous appeals should only be applied in the egregious cases, lest there be an improper chilling of the right to appeal erroneous lower court decisions. However, sanctions should be imposed when "an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in delayed implementation of the judgment of the lower court; increased costs of litigation; and disipation of the time and resources of the law court. 79 Utah Adv. Rep. at 36.

This court also awarded sanctions against the town of Mantua in **BRIGHAM CITY v. MANTUA TOWN**, 83 Utah Adv. Rep. 21 (Utah Ct. App. 1988). In that case, this Court ruled that there was no legal or factual basis upon which Mantua could reasonably expect to prevail and likewise that there was no reasonable basis for Mantua's appeal to Court of Appeals.

In the instant action, as stated many times earlier in this brief, for Plaintiff to have any possibility of prevailing on the appeal, there must be NO evidence upon which the trial court could reasonably base its decision. That simply and clearly is not the situation in the instant action.

In Judge Christoffersen's seven page Memorandum Decision, he distincly reviewed the testimony of all the witnesses, both pro and con, and also cited the law in referring to **HOGGE** and **KRAMER**. The Findings of Fact and Conclusions of Law are clear and detailed. Judge Christoffersen obviously weighed all of the evidence and based his decision on the evidence before him. There can be absolutely no doubt that there is considerable evidence which supports the trial court's decision, including the custody modification issue, attorneys fees and child support. As such, Plaintiff's appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing. The appeal has further delayed the implementation of the lower court's judgment, has increased the cost of litigation, which is especially egregious in this situation where Defendant is in no position to be able to afford defending herself in court, but has no choice in the matter, and is further a dissipation of the time and resources of this Court.

The Trial Court, after considering the proffers and evidence regarding attorneys fees, granted Defendant attorneys fees for initially defending herself. This Court should further grant Defendant attorneys fees and double costs for being required to respond to an appeal which is clearly lacking in merit.

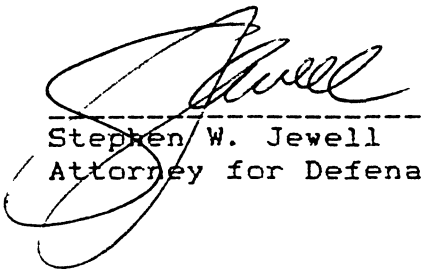
CONCLUSION

It is abundantly clear from the record, the Court's Memorandum Decision, and the Findings of Fact and Conclusions of Law, that the Trial Court considered and weighed the evidence in entering its decision. Judge Christoffersen found that Defendant was a fit and proper person to take care of the parties' son in spite of Plaintiff's efforts to pursuade the Court to the contrary. The Trial Court, in correctly applying the legal standards established by the Supreme Court of Utah, found, after considering all the evidence, that there had not been a substantial change in circumstances in Defendant's parenting ability or the custodial relationship to warrant reopening the custody issue and denied Plaitniff's Petition for change of custody. The Trial Court further found, based upon the evidence before it, that Defendant was entitled to an award of attorneys fees and that Plaintiff's circumstances had substantially changed to warrant a modification of the child support award to $150.00 per month.

Judge Christoffersen clearly did not abuse his discretion in reaching the decision he did in this case and his decision is supported by an abundance of evidence. In fact, the decision of the Trial Court is sufficiently supported by the evidence as to make it exteremly unlikely that Plaintiff could prevail on this appeal and this Court should grant Defendant attorneys fees in this action.

Plaintiff has failed to meet his burden in showing that the Trial Court abused its descretion. Therefore, the Judgment and Order of the Trial Court should be affirmed in all respects with attorneys fees and double costs to Defendant.

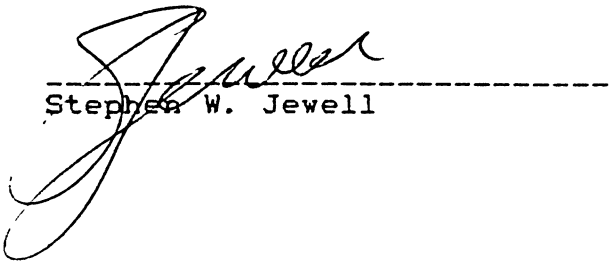
RESPECTFULLY SUBMITTED this 15 day of June, 1988.



Stephen W. Jewell
Attorney for Defenant/Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of June, 1988, I mailed four copies of the foregoing BRIEF OF RESPONDENT to Tim W. Healey, Attorney for Plaintiff/Respondent at 863 25th Street, Ogden, Utah 84401 by depositing the same in the U. S. Mail, postage prepaid.



Stephen W. Jewell

ADDENDUM

TAB 1. Memorandum Decision of Trial Court dated November 9, 1987.

TAB 2. Findings of Fact, Conclusions of Law, and Judgment and Order, dated November 23, 1987.

TAB 3. September 1987 Uniform Child Support Schedule.

Reproduction of Utah Code Provisions dealing with the Uniform Child Support Schedule, UCA 78-45-7.

TAB 4. Report of Dr. B. Mathews Hill, Dr. Ed. D., Family Therapist.

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

THOMAS G. MAUGHAN,	)	
Plaintiff	)	MEMORANDUM DECISION
v.	)	Civil No. 21388
PAULETTE LaDAWN NORMAN MAUGHAN	)	
Defendant	)	

This matter became before the Court on a hearing based on plaintiffs petition for a custody change based upon a substantial change in circumstances. It being the position of the petitioner, the defendant's lifestyle has changed substantially. It is alleged that since the divorce there have been several moves made to differe localities by the defendant causing instability as far as the household arrangements are concerned. Her ability of or will to properly supervise the child has deteriorated , she now allows the child too much freedom or surrograte care, not properly attend to his sanitary needs by allowing unsanitary conditions to exist in her household, fails to properly keep the child clean, well clothes, and properly fed. Also another factor in the change is that instances of promiscuity by the defendant has had an adverse effect on the child. Also an allegation of possible sexual child abuse by a boyfriend of the defendant although there is not evidence that this was within the knowledge of the defendant. There was evidence by Sandi Krebs that the defendant's housekeeping deteriorat from February to May of 1987 and the defendant indulged in the

use of alcohol. Another lady, Anita Perry, also testified to poor housekeeping and the kids being dirty. Petitioner's present wife also testified to her observation of the mother failing to keep proper control of the child and felt she should spend more time with the child, dress him better, and keep a better house. Petitioner also testified he did not like the way his ex-wife was taking care of his child. Ex-landlord Bill Peck testified also that while the defendant was living at his house as a tenant she would stay out late, let the kids run wild and allow them to be destructive.

This testimony was contradicted by the defendant stating under the circumstances she had few job skills, difficulty keeping steady employment, had insufficient income to allow her to spend as much time as she would like with her child and she received only $75.00 a month child support a month as aid from the petitioner

Also, other witnesses testified in her behalf. Rose King, a social worker testified that she monitored defendant's household for over a period of three months, made visits that were unscheduled so as the defendant would not know when she would be there, always found the house clean, the children taken care of, and saw no basis for finding the mother's care inappropriate. Also, a Mrs. Northrup whose daughter was a baby sitter for six months had ample opportunity to observe the child in question and also other children of the defendant and her observations felt she kept a good home and her parenting skills were not inappropriate. Nancy Hunt, a baby

sitter, also observed the children in the household of the defendant and felt that it was well cared for, the children were clean and well cared for, and showed great affection for the children and no inappropriate parental care.

Becky Valcarce, therapist for ISAT testified that she felt that there was evidence of sexual abuse to Riley by the defendant's boyfriend, Jack Alley, but no evidence that the defendant knew abou it. Sandy Robbinette, a clinical director of The Child and Family Support Center, stated she found no evidence of a distrubed child or one who had been sexually abused and found a positive relationsh as a parent. Roberta Hardy, also a social services worker, testifi as to discrepancies in the procedures used by Becky Valcarce in making her determination and found that the children were positive with their mother and the mother had done nothing wrong in the raising of her child. Obviously there was a great deal of conflict in the testimony regarding the defendant's supervision, child care, housekeeping, promiscuity and sexual abuse. A witness called by the petitioner, who was their former bishop, testified that after the divorce he counseled with the defendant, one of her difficulties was her husband the petitioner, that she was in dire financial strai with her children and emotionally upset immediately after the divorce because of her financial picture as a result of the divorce itself.

The Court does not feel that those changes that occur in a divorce are grounds to show a substantial change in circumstances

that would merit or should be even considered in determining the requisite substantial change in circumstances for a change of custo Divorce causes a change in circumstances by the very nature of the result of such a proceeding. Mathew Hill, a therapist, testified that his major concern was the stability of the child, Riley, by mo in residential changes by the defendant and an irregular visitation schedule, and he felt that the child's stability could be imporved by a regular visitation schedule, he also felt both parties had parenting skills that are appropriate and not out of line, there is a bonding to each of the parents. He did have some concern over changes in father-type figures by reason of the defendant having had different boyfriends.

The Court feels that the evidence does not support the defenda being a bad mother by improper child care, cleanliness, supervision or the lack thereof, that she is a good mother with appropriate child caring skills now as she was when she was married. There was probably a period of time right after the divorce, because of the effects of the divorce and a nine month period in Salt Lake after the divorce, where there was conduct that certainly could be labeled as promiscuous. But, there is no indication this had an impact that affected her children and it also appears that she has since stabilized from this position. She is apparently employed by doing piece work for ALCO, Inc., although this does require long hours and her income is only $650.00 a month. She is doing everything she can to work and support herself and her childr

The evidence also indicates that when she feels there may be a problem with her children, such as the allegations of sexual abuse by one of her boyfriends against Riley, she immediately took what steps she could to insure his safety and welfare and immediate. consulted professionals for aid.

A single parent who has to take what employment they can get certainly has more difficulty as opposed to dual parents. The single parent has to arrange schedules, child care, perform all the household tasks, that are necessary. The Court does not feel th the defendant should be penalized because of this kind of a situatic where she does not have the same financial abilities as the petitior in order to provide a stable environment. The fact that the petitioner is remarried making this a dual parent household is not such a substantial change of circumstances that would merit a change of custody or simply any remarriage would have the ping-pong effect on child custody.

The Court, therefore, feels the peitioner has not met the first prong of the test as stated under Hogg v. Hogg, 649 P.2nd 51. The Court feels the facts do not show defendants present position substantially affects the custodial parent's parenting ability or the functioning of the custodial relationship which justify re-opening the custody question. In Kramer v. Karmer, 57 UAR Page 14, petitioner there also sought a change of custody based on his wife's circumstances wherein he alleged that his ex-wife's new husband beat her, that she was alcoholic, that she suffers from a

narcissistic personality and created animosity between Jason and the appellant and refused to obtain treatment for the child and that the child was unwashed and unkept. The Court refused to acknowledge such conditions to be a substantial change of circumstances and refused to change custody.

There are facts and circumstances about the defendant's living position and lifestyle that are not the best for the child, but it cannot be said her actions and conduct and situation constitutes a substantial change of circumstances. The conduct, whatever it may b of the defendant, must be shown to have a substantial adverse impact upon the child, showing a material change of circumstances. That impact has not been shown even if her conduct has had defects and she bore an illegitimate child. Petitioner's request to have the custody change is denied.

The Court finds that in view of the difference in earning ability and actual income received by both parties, the defendant has sufficiently demonstrated the financial need for attorney's fees. The defendant proffered evidence of attorney's fees, showing time spent and the hourly rate charged and his position of the necessity of the number of hours spent and it was stipulated by counsel for the opposing side that the rate charged was a reasonable one and was commonly charged for divorce action in this community. Therefore, the Court awards the defendant attorney's fees based on the need and result achieved in the case in the amount of $3,000.00

The defendant also had a counterpetition for a change in child support payments because of a substantial change of circumstances showing that at the time of the divorce the income on farm income was based upon $800.00 to $1,000.00 per month income. The petitioner now has other employment where he received a gross income of $1,240.00 in addition to the farm income which at the time of the divorce was indicated to be $800.00 to $1,000.00. Although the petitioner testifies that farm income has now been reduced to anywhere from $700.00 a month to zero or in fact an actual loss. But, even so, his gross income has substantially incre more than double that of the defendant. Even eliminating the farm income, there is a substantial increase since the time of the divorce. The Court will, therefore, grant the petition for change of child support and raise the figure to $150.00 a month. Counsel for defendant to prepare the appropriate findings and order.

Dated this 9th day of November, 1987.

BY THE COURT:

VeNoy Christoffersen
District Judge

COPY OF THE ABOVE MAILED TO
Jim Healy, 863 25th St. Ogden, Ut. 84401 AND
Stephen Sorensen, 15 So. Main, Logan, Ut. 84321
THIS 9th DAY OF November, 1987
SETH S. ALLEN, CLERK
BY
DEPUTY

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C69 15

Stephen W. Jewell 3814
Attorney for Defendant
First Security Bldg., Third Floor
15 South Main
Logan, Utah 84321
Telephone: (801) 753-2000

IN THE DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH

THOMAS G. MAUGHAN, *

Plaintiff * FINDINGS OF FACT AND

v. * CONCLUSIONS OF LAW

PAULETTE LADAWN NORMAN MAUGHAN *

Defendant. * CIVIL NO. 21388

This matter came on for hearing before the Court, the Honorable VeNoy Christoffersen, sitting without a jury, on October 16, 1987 and again on November 5, 1987. Plaintiff was present and represented by counsel, Tim W. Healy. Defendant was present and represented by counsel, Stephen W. Jewell. The Court having heard the evidence and testimony presented and the arguments of counsel, and being fully advised in the premises, now finds and concludes as follows:

FINDINGS OF FACT

1. Although there was testimony from Plaintiff's witnesses to the effect that Defendant did not properly care and supervise the child, failed to properly keep the child

clean, well clothed and properly fed, that Defendant indulged in the use of alcohol, was sexually promiscuous and may have allowed the child to be sexually abused, the Court finds that, based on contradicting testimony, the Defendant properly maintained her home and took care of the child, that Defendant's care for the child and her parenting skills are not inappropriate, that the child was clean and well cared for and that Defendant shows great affection for the child.

2. Although there was evidence of potential sexual abuse to the child by the Defendant's boyfriend, Jack Alley, the Court finds there was no evidence that Defendant knew about any such sexual abuse, if any, and that Defendant immediately took what steps she could to ensure the child's safety and welfare and immediately consulted professionals for aid.

3. The Court further finds that although there may have been some changes in Defendant's life since the divorce, the Court does not feel that those changes that occur in a divorce are grounds to show a substantial change in circumstances that would merit or should even be considered in determining the requisite substantial change in circumstances for a change in custody. Divorce causes a change in circumstances by the very nature of the results of such a proceeding. Although there was probably a period of time right after the divorce, because of the effects of the divorce, and a nine month period in Salt Lake after the divorce where there was conduct that could be labeled as promiscuous, there is no indication that this conduct had an impact on or affected the child. It also

appears that Defendant has since stabilized from this position, that she is currently employed and that she is doing everything she can to work and support herself and her children.

4. The Court finds that a single parent who has to take what employment he or she can find certainly has more difficulty as opposed to dual parents. The single parent has to arrange schedules, child care, and perform all of the household tasks that are necessary. The Court does not feel that the Defendant should be penalized because of this kind of a situation nor because she does not have the same financial ability as the Petitioner in order to provide a stable environment.

5. The fact that Plaintiff is remarried making his a dual-parent household is not such a substantial change of circumstances that would merit a change of custody or simply any remarriage would have ping-pong effect on child custody.

6. There are facts and circumstances about the Defendant's living position and lifestyle that are not the best for the child, but the Court cannot find that her actions, conduct and situation constitute a substantial change of circumstances. The conduct, whatever it may be of the Defendant, must be shown to have a substantial adverse impact upon the child, showing a material change of circumstances. That impact has not been shown even if her conduct has had defects and she bore an illegitimate child.

7. The Court finds that in view of the difference in earning ability and actual income received by both parties, the Defendant has sufficiently demonstrated a financial need for attorney's fees.

8. The Court finds that Defendant proffered evidence of attorney's fees, showing time spent, the hourly rate charged, and the necessity of the number of hours spent in light of the difficulty of the case. It was stipulated by counsel for the Plaintiff that the rate charged was a reasonable one and was commonly charged for a divorce action in this community. The Court finds that Defendant should be awarded attorney's fees based on the need and results achieved in the case in the amount of $3,000.00.

9. The Court finds that Plaintiff's income has increased substantially from approximately $800.00 to $1,000.00 per month solely from farm income at the time of the divorce to a gross income from Plaintiff's employment with the Utah Department of Transportation of $1,240.00 in addition to farm income.

10. Even without farm income, the Court finds that Plaintiff's income has substantially increased and has more than doubled that of the Defendant.

11. Plaintiff's increased income constitutes a substantial change in circumstances sufficient to warrant a modification of the Decree to increase child support and to raise the child support figure to $150.00 per month.

12. The Court incorporates herein by reference such other facts as are stated in the Memorandum Decision dated November 9, 1987.

From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. Plaintiff has not met the first prong test as stated under **HOGGE v. HOGGE**, 694 P.2d 51.

2. There has not been a substantial nor material change in circumstances of the custodial parent's parenting ability or the functioning of the custodial relationship which would justify reopening the custody questions. Although there are facts and circumstances about the Defendant's living position and lifestyle that are not the best for the child, the Court concludes that it cannot be said that her actions, conduct and situation constitute a substantial change in circumstances. The Court concludes that such conduct, whatever it may be of the Defendant, does not show a material change of circumstances. The Court further concludes that those changes that occur as the result of a divorce are not grounds to show a substantial change in circumstances that would merit, or should even be considered in determining the requisite substantial change in circumstance for change in custody. Divorce causes a change in circumstnces by the very nature of the result of such a proceeding.

3. Plaintiff's request to have custody of Riley Maughan should be denied.

4. In view of the difference in earning ability and actual income received by both parties, Defendant has sufficiently demonstrated the financial need for attorney's fees. The Court concludes that $3,000.00 is a reasonable amount of attorney's fees, that the number of hours spent were necessary in light of the difficulty of the case, that the rate charged was reasonable as stipulated by opposing counsel and was commonly charged for divorce actions in the community, and that the award for attorney's fees is based on the need and results acheived in the case.

5. Due to Plaintiff's increase in income, there has been a substantial and material change in circumstances sufficient to warrant a modification of the Divorce Decree to increase child support for the minor child to $150.00 per month.

6. The Court incorporates herein by reference such other conclusions of law as are stated in the Memorandum Decision dated November 9, 1987.

DATED this 23rd day of November, 1987.

BY THE COURT:

VeNoy Christoffersen
District Judge

CERTIFICATE OF MAILING
AND
NOTICE

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to Tim W. Healy, Attorney at law, 863-25th Street, Ogden, Utah 84401, by depositing the same in the U.S. Mail, postage prepaid. Counsel for Defendant is hereby notified that pursuant to Rule 2.9 of the Rules of Practice, counsel has five (5) days to submit any objections to the Court.

DATED this 12 day of November, 1987.

Stephen W. Jewell

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Attorney for Defendant
First Security Bldg., Third Floor
15 South Main
Logan, Utah 84321
Telephone: (801) 753-2000

IN THE DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH

THOMAS G. MAUGHAN, *

Plaintiff * JUDGMENT AND ORDER

v. *

PAULETTE LADAWN NORMAN MAUGHAN *

Defendant. * CIVIL NO. 21388

This matter came on for hearing before the Court, the Honorable VeNoy Christoffersen, sitting without a jury, on October 16, 1987 and again on November 5, 1987. Plaintiff was present and represented by counsel, Tim W. Healy Defendant was present and represented by counsel, Stephen W. Jewell. The Court having heard the evidence and testimony presented and the arguments of counsel, and being fully advised in the premises, and having previously entered its Findings of Fact and Conclusions of Law, now enters the following:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Petition for Modification of Divorce is hereby denied and custody of the minor child of the parties, to wit: Riley Maughan, shall remain with Defendant.

2. Defendant is awarded Judgment against Plaintiff as and for attorney's fees in the amount of $3,000.00.

3. The Decree of Divorce shall be and is hereby modified to increase child support paid by Plaintiff to Defendant to $150.00 per month commencing November 1, 1987. Said child support shall be paid one half on the 5th and one half on the 20th of each month. Plaintiff's income may be withheld pursuant to UCA 78-45d-1, et. seq., if Plaintiff becomes delinquent in payment of child support obligations.

4. All of the provisions of the Decree entered previously in this action shall remain as stated.

DATED this 23rd day of November, 1987.

BY THE COURT:

VeNoy Christoffersen
District Judge

CERTIFICATE OF MAILING
AND
NOTICE

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT AND ORDER to Tim W. Healy, Attorney at law, 863-25th Street, Ogden, Utah 84401, by depositing the same in the U.S. Mail, postage prepaid. Counsel for Defendant is hereby notified that pursuant to Rule 2.9 of the Rules of Practice, counsel has five (5) days to submit any objections to the Court.

DATED this 12 day of November, 1987.

Stephen W. Jewell

UNIFORM CHILD SUPPORT SCHEDULE
(Amount To Be Paid Per Child)

Gross Monthly Income (4.3 Weeks)	Total Number of Children							
	1	2	3	4	5	6	7	8
0 - 295	32	24	19	16	14	12	10	9
296 - 384	37	32	25	21	18	16	14	12
385 - 473	53	41	32	26	23	20	17	16
474 - 562	63	47	38	33	28	24	21	19
563 - 651	75	56	45	37	33	28	25	23
652 - 741	86	64	56	44	37	33	28	26
742 - 830	96	72	57	48	41	36	32	29
831 - 919	108	80	64	54	46	41	36	33
920 - 1008	118	90	71	60	52	45	39	36
1009 - 1098	129	98	78	64	55	48	43	38
1099 - 1187	141	106	84	70	61	53	46	42
1188 - 1276	152	114	91	77	64	57	50	45
1277 - 1366	162	123	98	82	70	61	54	48
1367 - 1455	173	131	104	87	74	64	57	52
1456 - 1544	185	138	110	92	79	70	62	55
1545 - 1633	195	146	117	98	84	74	64	60
1634 - 1723	207	155	124	102	88	78	69	62
1724 - 1812	217	163	131	109	93	82	72	66
1813 - 1901	227	171	137	115	98	86	77	69
1902 - 1991	240	179	145	119	102	90	80	72
1992 - 2080	250	188	150	125	107	93	83	75
2081 - 2169	261	196	156	131	111	98	87	79
2170 - 2258	272	204	163	136	117	102	91	82
2259 - 2348	284	212	170	142	122	107	95	86
2349 - 2437	294	222	177	147	126	110	98	88
2438 - 2526	305	230	183	153	131	115	101	92
2527 - 2616	316	237	189	158	136	118	106	95
2617 - 2705	326	245	196	163	140	123	109	99
2706 - 2794	339	254	203	169	145	126	111	101
2795 - 2883	349	262	209	176	150	131	116	106
2884 - 2973	359	270	216	180	154	136	119	108
2974 - 3062	371	278	223	186	160	140	124	111
3063 - 3151	381	290	228	190	167	144	126	115
3152 - 3240	392	298	235	196	171	149	129	117
3241 - 3329	403	307	242	201	176	152	133	120

78-45-7. Determination of amount of support - Assessment formula for temproary support.

(1) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(2) When no prior court order exists, or a material change in circumstances has occurred, the court in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

(a) the standard of living and situation of the parties;
(b) the relative wealth and income of the parties;
(c) the ability of the obligor to earn;
(d) the ability of the obligee to earn;
(e) the need of the obligee;
(f) the age of the parties;
(g) the responsibility of the obligor for the support of others.

(3) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

(a) the amount of public assistance received by the obligee, if any;
(b) the funds that have been reasonably and necessarily expended in support of sppouse and children.

(4) In determining the amount of prospective support on an ex parte or other motion for temporary support, the court shall use a uniform statewide assessment formula, adjusted for regional differences, prior to rendering the support order. The formula shall provide for all relevant factors which can be readily identified and shall allow for reasonable deductions from the obligor's earnings for taxes, work related expenses, and living expenses. The assessment formula shall be established by the Department of Social Services and periodically reviewed by the Judicial Council under Subsection 3-21(3).

B. Mathews Hill, Ed.D.
Assessment & Psychotherapy
3670 Quincy Avenue Suite 101
Ogden, Utah 84403
(801) 782-9391

Mental & Emotional Assessment

Subject: Riley Maughan & Family
Report Date. October 13, 1987
Dates of Assessment: October 3, 4, 8, & 12, 1987

Assessment Purpose: This assessment was performed in response to a request made by Attorney Tim W. Healy, pursuant to an earlier order of the court in this matter. Specifically what was requested was an assessment of the mental and emotional factors involved in assisting the court to make a determination of this child's best interests in terms of custodial placement.

Family members completed the following assessment measures: Riley: Peabody Picture Vocabulary Test, Children's Apperception Test, Vineland Social Maturity Scale, Draw-A-Person Test, and clinical interviews; Paulette, Jannette, and Thomas Maughan: Becker Adjective Checklist, Checklist "C"-Taplin Version, Children's Problem Checklist, Likes and Dislikes Form, and the Personality Inventory for Children used as a measure of parental perception only. Each adult also completed a clinical interview. Thomas and Jannette Maughan also completed the Locke-Wallace Marital Adjustment Test.

Prior to or concurrent with the family assessment, the following documents were reviewed and collateral contacts made: The petition of the plaintiff and the response of the defendant were reviewed. A collateral contact was made with Becky Valcarce, M.S. of the ISAT office in Logan. During that contact I reviewed a videotape of the subject made on July 2,1987.

History, Interview Data and Mental Status of Family Members

Thomas Maughan:

Identifying Information Mr. Maughan was born January 15, 1987. He is currently 28 years old He was raised in Wellsville, Utah, the youngest of nine children His father was an educator and his mother was briefly employed outside the home at a cheese factory He spent a great deal of time doing farm work as he grew up. He continues to be involved with dairy farming He graduated from Skyview High School as an average student and briefly attended U.S.U. and Dixie College.

Occupational History Mr. Maughan reports long-standing involvement in farming beginning around his ninth grade year, with a hiatus during the time he served an L.D.S. mission. He resumed farming after his mission and occasionally worked at custom hay hauling, ditch digging and for another person's dairy before becoming associated with the current dairy enterprise. He reports having worked one season for Parsons. He has been employed full-time by the Utah Department of Transportation since May of 1984 He reports approximate earnings of $15,000.00 from the Utah Department of Transportation and $1,300 from the dairy annually. He receives a good fringe package from his state employment.

Marital History: Tom married Paulette in July, 1982 They were divorced later that year. Paulette was pregnant with Riley at the time of the divorce, and he was born after the divorce was in effect. Paulette had been granted custody in the original decree, with Tom being given reasonable visitation rights Tom met Jannette around the time of the divorce. Their courtship lasted approximately a year and a half and they were married in July of 1985 A son, Cliff, was born to this union.

Medical and Mental Health History: Tom's medical history is unremarkable with the exception of minor trauma requiring stitches. His mental health history includes counseling with Lynn Yaggi subsequent to a conviction of driving under the influence in 1982. He reports a positive termination from the counseling process. Tom has not had any subsequent DUI convictions. He notes that he would engage in occasional social drinking with male friends on weekends, but reports having abstained from drinking for several weeks He admits that during his marriage to Paulette he experimented with marijuana He reports a frequency of consumption of one to two times a month during that period.

Paulette Norman Maughan:

Identifying Information: Paulette was born May 12, 1961, the second of three girls in her family of origin She is 26 years of age. She notes that

she was separated in age from each of her sisters. She grew up, for the most part, in Brigham City. She moved to Cache Valley in her later teenage years as a result of her parents separating. Her parents later divorce and her mother remarried. Her father was a construction worker and artist and her mother provided home day care and did sewing for hire. Due to her family's moves, Paulette attended high school in Box Elder County, Logan City and at Skyview. She left school for employment but received her GED soon after discontinuing school. She attended one semester at Rick's College in Idaho and also took training as a nurse's aide and as a secretary.

Occupational History: While in high school, Paulette was a waitress in the Country Kitchen. She worked as a nurse's aide immediately upon discontinuing high school. She then attended Rick's, where she was not employed. She also choose not to be employed while married to her first husband, Dennis. She next worked for Bourn's (Boren's?). She reports that her son Cody became sick at that time and she was also laid off. Her next position was with the E.A. Miller Company. She reports not being employed while she was married to Tom. After divorcing Tom she moved to Ogden and was employed by Levelor Lorenz, Inc. She reports that she then became pregnant with Josh and was laid off. She then returned to Brigham City and took training for a secretarial position. After completing the training she worked part time for the Bank of Utah. She then sought full time employment in Salt Lake City, and found work with the Littlefield Company. She reports a dispute with her employer which resulted in her resigning. She also noted that Joshua was requiring treatment for problems at that time. She is currently employed doing piece work for Alco, Inc. She reports an income of $650 a month, if she is able to work all of her possible hours and if her piece rate is high. She also receives $75.00 child support from Tom. She has not been receiving the child support that was granted in her divorce settlement from the first marriage.

Marital History: Paulette was originally married to Dennis Kranendonk. They had lived together briefly and then were married. They had always fought and after the marriage his assaultive behavior increased. He became very difficult to live with after the birth of their son, Cody. After he physically abused the child, she left him. She recently placed a protective order against him since he would come to the current residence and again become abusive in from of the children. She notes that they were together for eight months and officially divorced after one year.

She reports meeting Tom in January of 1982. They dated for awhile and were married in July of that year. She reports that she was pregnant at the time but subsequently miscarried the child. She noted the onset of several

problems when she lost the baby. She reported that at that time Tom doubted she had ever been pregnant, and had used the pregnancy as a ploy to get him to marry her. She notes they both began to drink and use marijuana at that time and went their separate ways. They were divorced late in the autumn of the same year. Riley was conceived during the latter part of their relationship. Paulette did not remarry after this divorce. She has had one child since the divorce, namely Joshua. Paulette claims that Tom is the father of the child and this action is also before the court since Tom denies paternity. Paulette is currently pregnant with a child she claims was fathered by Jack Alley, her former fiance. She is considering giving the child up for adoption, since she feels she is not ready to handle the additional responsibility of another child and feels that the child might do better in an adoptive home.

Medical and Mental Health History: Paulette had one kidney removed as a teenager. She has been on medications to deal with the resulting deficiency since that time. She has also had a partial hearing loss for several years. She is currently taking Macrodanton to prevent kidney infections and prenatal vitamins. She acknowledges her marijuana use during her marriage to Tom. She also admits to social drinking. While admitting to getting drunk in the past , she denies that she drinks just to get drunk. She usually consumes wine cooler and/or beer. She denies keeping alcoholic beverages in the house. She does admit to some heavy drinking while she was going with Jack Alley, but she contends she became troubled by his excess drinking and this, in large measure, is what convinced her to break off the engagement. She reports being seen by a mental health professional at the time of marital discord with her first husband. The provider was a U.S.U. graduate student. She did not report any further involvement with a mental health professional beyond this encounter.

Jannette Maughan:

Identifying Information: Jannette was born January 21, 1964 and is 23 years old. She is the fourth of five children. Her father was employed by Utah & Idaho Sugar Company until he took over management of the Perry Lodge in Kanab. They are now managers of an R.V. park in Kanab. Jannette reports that she was active in sporting and extra-curricular activities all during her high school years and graduated from Kanab High School in 1982. She reports being employed in the family businesses from her teen age years on an intermittent basis. She also briefly attended U.S.U. and S.U.S.C. She has worked at a cheese plant and has worked with a graphic sign maker. She is not currently employed outside the home although she will occasionally

assist with the dairy work. This is her first marriage. One child, Cliff, has been born as a result of this union.

Riley Maughan:

Identifying Information: Riley is the subject of this assessment and the current court hearing. He was born July 23, 1983, several months after his

parents divorce. In the original divorce action custody of Riley was vested in the mother and reasonable visitation was granted to the father. In reality, Riley has experienced a number of custody arrangements. His visits at one point increased from every other weekend to periods of several weeks at a time when, according to Paulette, she was depressed regarding her employment outlook in Salt Lake City and allowed Tom and his wife physical custody for several weeks at a time. Thus Riley has experienced significant amounts of time in either home.

Mental Status Assessments: Nothing in any interview of the four principals of this action suggests the presence of a marked departure from reality or mental impairment classically associated with the common meaning of the term mental illness.

Assessment Results and Discussion:

Cognitive Factors: Riley's performance on the PPVT placed him in the 80th percentile in terms of his cognitive potential. That is to say that he performed at the mental age of an average child of five years and one month. He earned an intelligence quotient of 112. This would place him in a high average range of intellectual ability. There were not any indications at this point of gross cognitive impairment. However, neither readiness functions or learning disabilities were specifically addressed during this assessment. Coordination and related functions appeared to be intact.

Social Factors: Assessment of Riley's social functioning would indicate that he is functioning with social skills possessed by the average child around six years of age. The functioning being addressed her concerns self-help skills as well as communication, socialization and self-direction. There was some tendencies toward aggression noted, as well as a low frustration tolerance. There is also some indication of a very social social attention span.

Emotional Factors: Riley has a tendency to give up on tasks easily. He is quick to discern areas where he perceives he lacks skills. He is sometimes

found to feign inadequacy in order to avoid tasks using such phrases as, "I just don't know how." When taken in conjunction with his intellectual abilities, it becomes apparent that Riley does know how to accomplish several tasks, but chooses not to do so. Riley sees himself as unable to master the environment which surrounds him and fears defeat at its hands. His aggression can therefore be seen as a compensatory attempt to take charge of himself.

This is not to say that Riley does not have strengths. He has the ability to relate well to peers and adults. He sees cause and effect relationships quite clearly and has an understanding of concepts that is advanced for his age. He also has verbal skills sufficient to communicate his wants, needs and feelings. He can engineer creative solutions to problems when they interest him, and can generate solutions which go beyond the parameters set for him by others. He can employ active fantasy but also is able to distinguish truth from falsehood.

Family Factors:

Family factors which mental health professionals are generally asked to evaluate relate to the dimensions noted in Hutchison v. Hutchison (Utah, 649 P.2d 38). These are discussed below.

Preference for keeping siblings together: This does not have much application for Riley. He has lived with and bonded to siblings in both residences. Sibling subsystems in each household are part of his active experience.

Relative strength of the child's bond to each prospective custodian: This is somewhat difficult to determine in Riley's case. There is definite bonding with the father, the mother and the stepmother. In all of the interviews where he discussed his family or his parents, he would first and sometimes solely mention Mr. Maughan and his wife. I do not ask children of this age to state a parental preference.

General interest in maintaining current custody arrangements: As noted above, there have been a variety of combinations of custody and visitation. In essence, there is no status quo. However, I feel that is in Riley's best interest to make a final determination on this matter be fore he enters the school system and suffers academically due to an unresolved custody issue. The presumption of the benefit of the status quo also assumes that the child is happy and well adjusted in his current status. This cannot be said of Riley's current situation. As noted, he is beginning to display adjustment

problems and his compensatory behaviors show a lack of achievable happiness

Moral character and emotional stability of prospective custodians None of the prospective custodians displayed any sign of severe mental disorder Tom and Paulette have both have admitted to occasional drinking and past experimentation with marijuana The father and stepmother have promoted moral character through a set of principles derived from their religious affiliation Questions have been raised about the moral development possible in the mothers home This examiner does have concerns in this area as well The changing of male parent figures in the home is confusing to a young child The possible abuse at the hands of a father figure certainly can add to the level of confusion A young child also has difficulty differentiating between a father and a person who is just living at home or sleeping with a parent Frequent moves may or may not be a sign of parental emotional stability, but they generally have a negative impact on children, especially as they reach the age of school attendance

Duration and depth of desire for custody Paulette has maintained that she has always wanted Riley, but was willing to negotiate some kind of joint custody arrangement Tom and Jannette have made attempts or request for custody since soon after they were married

Significant impairment of a prospective custodian As noted there are not any apparent gross mental impairments observable in any of the prospective custodians I do have concerns that their may be some occupational maladjustment on the part of Paulette as evidenced by her frequent job shifts and failure to pursue any given line of work for an extended period of time

Personal versus surrogate care Both Paulette and Tom are employed outside of the home Paulette provides day care through licensed home day care providers She provides care in the evenings when she goes out by teenage youth in the area and occasionally with her mother Tom provides care for the children by Jannette, since she seldom works outside of the home When they go out as a couple, relatives generally serve as day care providers There are some marked emotional advantages to having a parental figure provide day care This does not preclude a positive experience with licensed day care, although the stability and longevity is usually less

Financial considerations: The father is clearly in a superior position in terms of current salary and earning potential, as well as having a smaller family.

Conclusions:

While the weight given to each of the above items is at the discretion of the court, there does appear to be significant evidence to this examiner that the home of the father may be able to provide a more stable environment for Riley at this time. Looking after the best interests of the child does not always involve deciding between good and bad, but may also look at good versus better. I look forward to being able to further clarify my findings during the hearing on the sixteenth.

Sincerely yours,

B. Mathews Hill

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